UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

OCT 21 2008

RECEIVED

ORAL ARGUMENT NOT SCHEDULED

Case No. 08-1194

Consolidated with Case Nos. 07-1369, 07-1370, 07-1371, 07-1372, 07-1410

THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

The National Industrial Transportation League; National Grain and Feed Association; American Chemistry Council; The Fertilizer Institute; Colorado Wheat Administrative Committee; Colorado Wheat Growers Association; Consumers United for Rail Equity; Idaho Barley Commission; Idaho Grain Producers Association; Idaho Wheat Commission; Montana Grain Growers Association; Montana Wheat and Barley Committee; National Association of Wheat Growers; National Barley Growers Association; Nebraska Wheat Board; Nebraska Wheat Growers Association; North Dakota Grain Dealers Association; North Dakota Public Service Commission; North Dakota Wheat Commission; Oklahoma Wheat Commission; South Dakota Wheat Commission; South Dakota Wheat Inc.; Texas Wheat Producers Board; Texas Wheat Producers Association; Alliance for Rail Competition; Washington Wheat Commission; and the Honorable Brian Schweitzer, Governor, State of Montana

Petitioners,

v.

Surface Transportation Board and
United States of America

Respondents,

Association of American Railroads; Canadian Pacific Railway Company; CSX Transportation, Inc.; Delaware & Hudson Railroad Company, Incorporated; Norfolk Southern Railway Company; Soo Line Railroad Company; Union Pacific Railroad Company

Intervenors.

On Petition for Review of an Order of
the Surface Transportation Board

BRIEF OF PETITIONERS
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE ET AL.

Andrew P. Goldstein
John M. Cutler, Jr.
McCarthy, Sweeney & Harkaway, P.C.
2175 K Street, NW, Suite 600
Washington, DC 20037
Phone: (202) 775-5560

Nicholas J. DiMichael
Jeffrey O. Moreno
THOMPSON HINE LLP
1920 N Street, NW, Suite 800
Washington, DC 20036
Phone: (202) 331-8800

ORAL ARGUMENT NOT SCHEDULED

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Petitioners submit the following Certificate of Counsel required by Cir. R. 28(a)(1):

A. Parties and Amici. The parties appearing before the Surface Transportation Board ("Board") in the rulemaking proceeding below were Alliance for Rail Competition; PPL Energy Plus, LLC; American Short Line and Regional Railroad Association; Arkansas Electric Cooperative Corp.; Association of American Railroads; BASF Corp.; BNSF Railway Company; Canadian National Railway Company; Canadian Pacific Railway Company; Cargill, Inc.; CF Industries, Inc.; ChevronPhillips Chemical Company LP; Dow Chemical Company; E.I. du Pont de Nemours and Company; National Industrial Transportation League; Norfolk Southern Railway Company; CSX Transportation, Inc.; Occidental Chemical Corp.; Olin Chemicals; Paducah & Louisville Railway, Inc.; Snavely King Majoros O'Connor & Lee, Inc.; Terra Industries, Inc; Union Pacific Railroad Company; Kansas City Southern Railway Company; United Transportation Union—General Committee of Adjustment; U.S. Clay Producers Trafffic Association, Inc.; U.S. Department of Agriculture; U.S. Department of Transportation; United States Steel Corporation; North Dakota Grain Dealers Association; North Dakota Public Service Commission; North Dakota Wheat Commission; North Dakota Grain Growers Association; North Dakota Farmers Union; North Dakota Farm Bureau; American Chemistry Council; American Forest and Paper Association; American Soybean Association; Colorado Wheat Administrative Committee; The Fertilizer Institute; Glass Producers Transportation Council; Idaho Barley Commission; Idaho Wheat Commission; Institute of Scrap Recycling Industries, Inc.; Montana Wheat and Barley Committee; National Association of Wheat Growers; National Barley Growers Association; National Corn Growers Association; National Council of Farmer Cooperatives; National Farmers Union; National Grain and Feed Association; National Oilseed

Processors Association; National Petrochemical and Refiners Association; Nebraska Wheat Board; North American Millers' Association; Oklahoma Wheat Commission; Paper & Forest Industry Transportation Committee; South Dakota Wheat Commission; Texas Wheat Producers Board; Washington Wheat Commission; Consumers United for Rail Equity; National Sorghum Producers; USA Rice Federation; The Honorable Brian Schweitzer, Governor of Montana; American Farm Bureau Association; Pacific Egg and Poultry Association; National Council of Farmer Cooperatives; Renewable Fuels Association; Agricultural Retailers Association; Agribusiness Association of Iowa; California Grain and Feed Association; Grain and Feed Association of Illinois; Indiana Grain and Feed Association; Iowa Soybean Association; Kansas Grain and Feed Association; Michigan Agribusiness Association; Michigan Bean Shippers; Minnesota Grain and Feed Association; Missouri Ag Industries Council; Nebraska Grain and Feed Association; Oklahoma Grains and Feed Association; Ohio Agribusiness Association; Texas Grain and Feed Association; and Wisconsin Agri-Service Association.

B. Rulings Under Review. Petitioner seeks review of a final rulemaking decision of the Board in STB Ex Parte No. 646 (Sub-No. 1), Simplified Standards for Rail Rate Cases (served Sept. 5, 2007), reconsideration denied (served March 19, 2008). These decisions are reproduced at pages __-__ and __-__ of the Joint Appendix. There is no official citation for this decision.

C. Related Cases. This case has not previously been before this Court or any other court. This case is related to three other proceedings currently before this Court in Case Nos. 08-1246, 08-1247, and 08-1248. In those cases, CSX Transportation, Inc. has petitioned for review of three Board decisions that are the first to apply the rail rate reasonableness review standards that are the subject of this proceeding. There are no related cases pending in any other Court.

CORPORATE DISCLOSURE STATEMENTS

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE'S DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, The National Industrial Transportation League ("NITL") discloses that it is a not-for-profit trade association that represents parties interested in freight transportation. NITL seeks review of decisions by the Surface Transportation Board for determining the reasonableness of rail rates.

NATIONAL GRAIN AND FEED ASSOCIATION'S DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, The National Grain and Feed Association discloses that it is a not-for-profit trade association that represents and provides service for grain, feed, and grain-related commercial businesses. The National Grain and Feed Association seeks review of decisions by the Surface Transportation Board in which the agency adopted certain changes to existing standards for determining the reasonableness of rail transportation rates.

NORTH DAKOTA GRAIN DEALERS ASSOCIATION'S DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, The North Dakota Grain Dealers Association discloses that it is a trade association that represents and promotes the interests of grain dealers. The North Dakota Grain Dealers Association seeks review of decisions by the Surface Transportation Board in which the agency adopted certain changes to existing standards for determining the reasonableness of rail transportation rates.

CONSUMERS UNITED FOR RAIL EQUITY'S DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Consumers United for Rail Equity ("CURE") discloses that it is a trade association that represents freight rail consumers. CURE seeks review of decisions by the Surface Transportation Board in which the agency adopted certain changes to existing standards for determining the reasonableness of rail transportation rates.

AMERICAN CHEMISTRY COUNCIL'S DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, The American Chemistry Council discloses that it is a trade association that represents North American companies engaged in the chemistry industry . The American Chemistry Council seeks review of decisions by the Surface Transportation Board in which the agency adopted certain changes to existing standards for determining the reasonableness of rail transportation rates.

THE FERTILIZER INSTITUTE'S DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the Fertilizer Institute ("TFI") discloses that it is a trade association that represents the interests of producers, manufacturers, retailers, and transporters of fertilizer. TFI seeks review of decisions by the Surface Transportation Board in which the agency adopted certain changes to existing standards for determining the reasonableness of rail transportation rates.

IDAHO GRAIN PRODUCERS ASSOCIATION'S DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the Idaho Grain Producers Association discloses that it is a trade association that represents the interests of Idaho grain producers at the local, state, and federal levels. The Idaho Grain Producers Association seeks review of decisions by the Surface Transportation Board in which the agency adopted certain changes to existing standards for determining the reasonableness of rail transportation rates.

NEBRASKA WHEAT GROWERS ASSOCIATION'S DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the Nebraska Wheat Growers Association discloses that it is a trade association that represents the interests of the wheat and promotes government policy both statewide and nationally for farm programs, development of improved crop insurance, soil, and water conservation, environmental issues, energy, and transportation issues. The Nebraska Wheat Growers Association seeks review of decisions by the Surface Transportation Board in which the agency adopted certain changes to existing standards for determining the reasonableness of rail transportation rates.

NATIONAL ASSOCIATION OF WHEAT GROWER'S DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the National Association of Wheat Growers discloses that it is a trade association that represents the interests of the wheat industry in creating beneficial policies for wheat growers, effective relationships within the industries, and profitable opportunities through research and technology. The National Association of Wheat Growers seeks review of decisions by the Surface Transportation

Board in which the agency adopted certain changes to existing standards for determining the reasonableness of rail transportation rates.

SOUTH DAKOTA WHEAT INC.'S DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, South Dakota Wheat Inc. discloses that it is an agricultural trade association that represents the interests of wheat producers on issues such as research, environmental and conservation issues, crop insurance, and transportation. South Dakota Wheat Inc. seeks review of decisions by the Surface Transportation Board in which the agency adopted certain changes to existing standards for determining the reasonableness of rail transportation rates.

SOUTH DAKOTA WHEAT COMMISSION'S DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the South Dakota Wheat Commission discloses that it is established by the state of South Dakota for the stabilization and profitability of South Dakota wheat industry through research, market development, and promotion. South Dakota Wheat Commission seeks review of decisions by the Surface Transportation Board in which the agency adopted certain changes to existing standards for determining the reasonableness of rail transportation rates.

TEXAS WHEAT PRODUCERS ASSOCIATION'S DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the Texas Wheat Producers Association discloses that it is a trade association that represents Texas wheat producers in state and federal government legislation. The Texas Wheat Producers Association seeks review of decisions by the Surface Transportation Board in which the agency adopted

certain changes to existing standards for determining the reasonableness of rail transportation rates.

TEXAS WHEAT PRODUCERS BOARD'S DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the Texas Wheat Producers Board discloses that it was created by Texas state commodity referendum law to oversee the collection and expenditure of check off dollars in the wheat industry. Texas Wheat Producers Board seeks review of decisions by the Surface Transportation Board in which the agency adopted certain changes to existing standards for determining the reasonableness of rail transportation rates.

WASHINGTON WHEAT COMMISSION'S DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the Washington Wheat Commission discloses that it is a state agency created by wheat producers to promote research, development, and education in the wheat industry. The Washington Wheat Commission seeks review of decisions by the Surface Transportation Board in which the agency adopted certain changes to existing standards for determining the reasonableness of rail transportation rates.

MONTANA GRAIN GROWERS ASSOCIATION'S DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the Montana Grain Growers Association discloses that it Montana Grain Growers Association is a trade association that promotes the interests of wheat and barley growers.. The Montana Grain Growers Association seeks review of decisions by the Surface Transportation Board in which the

agency adopted certain changes to existing standards for determining the reasonableness of rail transportation rates.

NATIONAL BARLEY GROWERS ASSOCIATION'S DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the National Barley Growers Association discloses that it is a trade association that promotes the interest of U.S. barley growers both nationally and internationally. The National Barley Growers Association seeks review of decisions by the Surface Transportation Board in which the agency adopted certain changes to existing standards for determining the reasonableness of rail transportation rates.

OKLAHOMA WHEAT COMMISSION'S DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the Oklahoma Wheat Commission discloses that it is a state created trade association that promotes the interest of Hard Red Winter wheat. The Oklahoma Wheat Commission seeks review of decisions by the Surface Transportation Board in which the agency adopted certain changes to existing standards for determining the reasonableness of rail transportation rates.

THE ALLIANCE FOR RAIL COMPETITION'S DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the Alliance for Rail Competition discloses that it is a trade association that represents railroad shippers in the agricultural, coal, consumer and industrial products, chemical, minerals, and petrochemical industries. The Alliance for Rail Competition seeks review of decisions by the Surface Transportation Board in which the agency adopted certain changes to existing standards for determining the reasonableness of rail transportation rates.

IDAHO WHEAT COMMISSION'S DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the Idaho Wheat Commission for discloses that it is a quasi-state agency that promotes wheat market development, research, and education for the wheat industry. The Idaho Wheat Commission seeks review of decisions by the Surface Transportation Board in which the agency adopted certain changes to existing standards for determining the reasonableness of rail transportation rates.

IDAHO BARLEY COMMISSION'S DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the Idaho Barley Commission for discloses that it is a self governing state agency that serves to enhance the profitability of barley growers through research, market development, promotion, information, and education. The Idaho Barley Commission seeks review of decisions by the Surface Transportation Board in which the agency adopted certain changes to existing standards for determining the reasonableness of rail transportation rates.

COLORADO WHEAT GROWERS ASSOCIATION'S DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the Colorado Wheat Growers Association discloses that it is a trade association that represents members in legislative matters on the state and national levels. The Colorado Wheat Growers Association seeks review of decisions by the Surface Transportation Board in which the agency adopted certain changes to existing standards for determining the reasonableness of rail transportation rates.

COLORADO WHEAT ADMINISTRATIVE COMMITTEE'S DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the Colorado Wheat Administrative Committee discloses that it is a state created Board that controls funding for education, research, and domestic and export promotion programs. The Colorado Wheat Administrative Committee seeks review of decisions by the Surface Transportation Board in which the agency adopted certain changes to existing standards for determining the reasonableness of rail transportation rates.

MONTANA WHEAT AND BARLEY COMMITTEE'S DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the Montana Wheat and Barley Committee discloses that it is a state funded check off program for barley growers in Montana. It promotes research, marketing, and end- use to aid in the market development of wheat and barley grown in Montana. The Montana Wheat and Barley Committee seeks review of decisions by the Surface Transportation Board in which the agency adopted certain changes to existing standards for determining the reasonableness of rail transportation rates.

NORTH DAKOTA WHEAT COMMISSION'S DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the North Dakota Wheat Commission discloses that it is a quasi state organization that utilizes check off funding to develop policies and programs that promote worldwide wheat markets and influence import and export policies. The North Dakota Wheat Commission seeks review of decisions by the Surface Transportation Board in which the agency adopted certain changes to existing standards for determining the reasonableness of rail transportation rates.

NEBRASKA WHEAT BOARD'S DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the Nebraska Wheat Board discloses that it is a state agency that levies taxes on wheat marketed in Nebraska and uses tax funds to further national and international wheat market development, policy development, research, promotion, and education. The Nebraska Wheat Board seeks review of decisions by the Surface Transportation Board in which the agency adopted certain changes to existing standards for determining the reasonableness of rail transportation rates.

TABLE OF CONTENTS

PAGE

Certificate As To Parties, Rulings and Related Cases i

Corporate Disclosure Statements iii

Table of Contents xii

Table of Authorities xiv

Glossary xvi

Statement of Jurisdiction 1

Statement of Issues 1

Statutes and Regulations 2

Statement of Facts 3

Summary of Argument 7

Standing 9

Argument 10

I. The Levels of the Relief Caps Imposed on Three-Benchmark and Simplified-SAC Presentations Violate the Statute 10

A. The Board's Failure to Identify a Minimum Risk Factor Was Arbitrary and Capricious 13

1. The Board's failure to Identify any Risk Factor for a Full-SAC Presentation Precludes a Finding that the Simplified-SAC Relief Cap Complies with Section 10701(d)(3) 15

2. The Board's failure to Identify a Minimum Risk Factor for a Simplified-SAC Presentation Precludes a Finding that the Three-Benchmark Relief Cap Complies with Section 10701(d)(3) 17

B. The Board's Failure to Consider the Reasonableness of the Relief Forfeited by the Caps was Arbitrary and Capricious and Not in Accordance with the Statute 20

PAGE

II. Simplified-SAC is an Arbitrary and Capricious Departure From Board Precedent 25

A. The Board's Refusal to Consider Efficiency in a Simplified-SAC Presentation is an Unreasonable Departure From Its Prior Determinations that Efficiency is an Essential Objective of CMP 26

B. The Board's Refusal to Test Simplified-SAC was Arbitrary and Capricious 30

Conclusion 31

Certificate of Compliance with Type-Volume Limitation Typeface Requirements, and Type Style Requirements 32

Certificate of Service 33

Petitioners' Standing Affidavits

TABLE OF AUTHORITIES

PAGE

COURT CASES

*Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.,
419 U.S. 281 (1974) 15

Burlington Northern R.R. Co. v. ICC,
985 F. 2d 589 (D.C. Cir. 1993) 13

Burlington Northern R.R. v. STB,
114 F.3d 206 (D.C. Cir. 1997) 30

Burlington Truck Lines, Inc. v. U.S.,
371 U.S. 156 (1962) 18

Consolidated Rail Corp. v. U.S.,
812 F.2d 1444 (3d Cir. 1987) 4

*Motor Vehicle Mfrs. Assoc. of the United States v.
State Farm Mutual Automobile Inc. Co., 463 U.S. 29 (1983) 15, 20, 25

Sierra Club v. EPA,
292 F.3d 895 (D.C. Cir. 2002) 9

ADMINISTRATIVE CASES

*Coal Rate Guidelines – Nationwide,
1 I.C.C.2d 520 (1985) 3, 4, 26

Kansas City P&L Co. v. Union Pac. R.R. Co.,
STB Docket No. 42095 (served May 19, 2008) 30

Rate Guidelines – Non-Coal Proceedings,
Ex Parte No. 347 (Sub-No. 2), 1986 ICC Lexis 306 (May 21, 1986) 5

Rate Guidelines – Non-Coal Proceedings,
Ex Parte No. 347 (Sub-No. 2), 1995 ICC Lexis 301, *1 (Dec. 1995) 5

*Rate Guidelines – Non-Coal Proceedings,
1 S.T.B. 1004 (served Dec. 27, 1996) 5, 26, 29, 30

Simplified Standards for Rail Rate Cases,
Ex Parte No. 646 (Sub-No. 1) (served July 28, 2006) 6

West Texas Utilities Co. v. Burlington Northern R.R. Co.,
1 S.T.B. 638 (1996) 30

* Authorities upon which we chiefly rely are marked with asterisks.

PAGE

STATUTORY AUTHORITIES

5 U.S.C. § 706 12

28 U.S. § 2321(a) 1

28 U.S.C. § 2342(5) 1

49 U.S.C. § 10701 ..... 2, 4

49 U.S.C. § 10701(d)(1) 1, 3, 8, 11, 12, 20, 23

49 U.S.C. § 10701(d)(3) 1, 3, 8, 11-15, 17, 18, 20, 21, 23-26, 30

GLOSSARY

AAR	Association of American Railroads
ACC	American Chemistry Council
Board	Surface Transportation Board
Bowman	Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285 (1974)
CMP	Constrained Market Pricing
Full-SAC	Full Stand-Alone Cost; same as SAC
Guidelines	Coal Rate Guidelines—Nationwide, 1 I.C.C.2d 520 (1985)
ICC	Interstate Commerce Commission
NGFA	National Grain and Feed Association
NITL	National Industrial Transportation League
Non-Coal Guidelines	Rate Guidelines—Non-Coal Proceedings, 1 S.T.B. 1004 (1996)
Reconsideration Decision	STB Ex Parte No. 646 (Sub-No. 1), Simplified Standards for Rail Rate Cases (served March 19, 2008) (JA __)
SAC	Stand-Alone Cost; same as Full-SAC
SARR	Stand-Alone Railroad
Simplified-SAC	Simplified Stand-Alone Cost
Simplified Standards	STB Ex Parte No. 646 (Sub-No. 1), Simplified Standards for Rail Rate Cases (served Sept. 5, 2007) (JA __)
State Farm	Motor Vehicle Mfrs. Assoc. of the United States v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983)
TFI	The Fertilizer Institute

STATEMENT OF JURISDICTION

Petitioners ask this Court to set aside, in part, an order of the Surface Transportation Board ("Board") in STB Ex Parte No. 646 (Sub-No. 1), Simplified Standards for Rail Rate Cases (served Sept. 5, 2007) ("Simplified Standards"), reconsideration denied, (decision served March 19, 2008) ("Reconsideration Decision"). Petitioners filed a timely Petition for Review of this final order of the Board on May 16, 2008.

The Board issued the above order, after notice and comment rulemaking pursuant to 5 U.S.C. § 553(c), "to establish a simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case," as required by 49 U.S.C. § 10701(d)(3). This Court has jurisdiction to review and enjoin all final orders of the Board pursuant to 28 U.S.C. §§ 2321(a) and 2342(5).

STATEMENT OF ISSUES

1. Whether the Board's failure to determine if the levels of the relief caps for Three-Benchmark and Simplified-SAC presentations provide a simplified and expedited method for challenging the reasonableness of rail rates for *all* cases when a Full-SAC presentation is too costly, given the value of the case, was arbitrary, capricious, and not in accordance with 49 U.S.C. § 10701(d)(1) and (3)?

2. Whether the Simplified-SAC methodology is an arbitrary and capricious departure from Board precedent without a cogent explanation?

STATUTES AND REGULATIONS

The pertinent statutes and regulations are set forth below:

49 USC § 10701

§ 10701. Standards for rates, classifications, through routes, rules, and practices

(a) A through route established by a rail carrier must be reasonable. Divisions of joint rates by rail carriers must be made without unreasonable discrimination against a participating carrier and must be reasonable.

(b) A rail carrier providing transportation subject to the jurisdiction of the Board under this part may not discriminate in its rates against a connecting line of another rail carrier providing transportation subject to the jurisdiction of the Board under this part or unreasonably discriminate against that line in the distribution of traffic that is not routed specifically by the shipper.

(c) Except as provided in subsection (d) of this section and unless a rate is prohibited by a provision of this part, a rail carrier providing transportation subject to the jurisdiction of the Board under this part may establish any rate for transportation or other service provided by the rail carrier.

(d) (1) If the Board determines, under section 10707 of this title, that a rail carrier has market dominance over the transportation to which a particular rate applies, the rate established by such carrier for such transportation must be reasonable.

(2) In determining whether a rate established by a rail carrier is reasonable for purposes of this section, the Board shall give due consideration to—

(A) the amount of traffic which is transported at revenues which do not contribute to going concern value and the efforts made to minimize such traffic;

(B) the amount of traffic which contributes only marginally to fixed costs and the extent to which, if any, rates on such traffic can be changed to maximize the revenues from such traffic; and

(C) the carrier's mix of rail traffic to determine whether one commodity is paying an unreasonable share of the carrier's overall revenues,

recognizing the policy of this part that rail carriers shall earn adequate revenues, as established by the Board under section 10704(a)(2) of this title.

(3) The Board shall, within one year after January 1, 1996, complete the pending Interstate Commerce Commission non-coal rate guidelines proceeding to establish a simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case.

STATEMENT OF FACTS

Under 49 U.S.C. § 10701(d)(1), the rates imposed on captive shippers by market dominant railroads "must be reasonable." This case involves the Board's latest effort to develop a test of rate reasonableness that, as required by Congress, will offer effective regulatory recourse for the majority of the nation's captive rail shippers.

At 49 U.S.C. § 10701(d)(3), which was enacted as part of the ICC Termination Act of 1995, Congress gave the Board one year to "complete the pending Interstate Commerce Commission non-coal rate guidelines proceeding to establish a simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case." Up to that time, the only method for challenging the reasonableness of rail rates was a full stand-alone cost ("Full-SAC") presentation, which the ICC adopted in Coal Rate Guidelines—Nationwide, 1 I.C.C.2d 520

(1985) ("Guidelines"), aff'd sub nom. Consolidated Rail Corp. v. U.S., 812 F.2d 1444 (3d Cir. 1987).

In Guidelines, the ICC adopted a set of principles for determining maximum reasonable rail rates under 49 U.S.C. § 10701, known as "constrained market pricing" ("CMP"). The two economic theories underlying CMP —differential pricing and contestability of markets— provide the analytical basis for determining those costs for which a captive rail shipper properly may be charged and the extent to which the shipper should bear those costs. Id. at 525. The three objectives of CMP are that a captive shipper should not (1) be required to pay more than is necessary for a railroad to earn adequate revenues; (2) pay more than is necessary for efficient service; or (3) bear the costs of any facilities or services from which it derives no benefit. Guidelines at 523.

Full-SAC, which is the principal constraint in CMP, attempts to implement these objectives by simulating the competitive rate that would exist in a contestable market (*i.e.* a market free from barriers to entry). Simplified Standards at 8 (JA __). Under Full-SAC, a shipper must design a hypothetical competitor railroad, known as a "stand-alone railroad" ("SARR"), that is optimally efficient and that does not require any of the services it provides to cross-subsidize costs directly attributable to any other service. The challenged rate cannot be higher than the rate the SARR would need to charge to serve the shipper while fully covering all of its costs, including a reasonable return on investment. Id. at 8-9 (JA __-__). A Full-SAC analysis produces a simulated competitive rate against which to judge the challenged rate and at which to determine the level of the maximum reasonable rate. Id.

However, soon after it developed the Full-SAC standard, the ICC recognized that a Full-SAC presentation, which is extremely costly, complex and time-consuming, might not be

suitable for movements other than high-volume, unit train traffic.[1] Coal-burning electric utilities that transported millions of tons of coal between the same two points year after year were virtually the only shippers who appeared to be capable of benefiting from a Full-SAC presentation. Shippers of commodities that moved in smaller volumes or between multiple points that changed frequently could not economically justify the multi-million dollar cost of a Full-SAC litigation. E.g., Rate Guidelines—Non-Coal Proceedings, Ex Parte No. 347 (Sub-No. 2), 1995 ICC LEXIS 301, *1 (Dec. 1995). These shippers were left without an effective remedy against unreasonably high rates. Accordingly, the agency, recognizing that the statutory goals were not being achieved, initiated a proceeding to consider simplified alternative procedures for such cases. Rate Guidelines—Non-Coal Proceedings, Ex Parte No. 347 (Sub-No. 2), 1986 ICC LEXIS 306 (May 21, 1986).

Despite the agency's 1986 conclusion that a simplified methodology was needed, after nearly a decade, the ICC still had not adopted simplified procedures. By that time, it was clear that Full-SAC was so costly, complex and time-consuming that only shippers with tens of millions of dollars at stake could afford to challenge the reasonableness of their rail rates. At that point, Congress intervened in the ICC Termination Act to order the Board to complete its proceedings by adopting a "simplified and expedited" alternative to Full-SAC within one year, in order to provide all captive shippers with a remedy for unreasonable rail rates.

The Board responded to this Congressional directive by adopting a simplified standard, called a "Three-Benchmark" presentation, in Rate Guidelines—Non-Coal Proceedings, 1 S.T.B. 1004 (served Dec. 27, 1996) ("Non-Coal Guidelines"). But the new standard lacked sufficient clarity and definitiveness for shippers, who found it impossible to determine whether they were

[1] The Board acknowledged below that Full-SAC cases cost approximately $5 million and require several years to litigate. Simplified Standards at 31 (JA __).

eligible even to use the simplified standard or what level of relief they reasonably could expect to obtain in order to value their case. Consequently, the 1996 Three-Benchmark standard languished unused for nearly another decade.[2]

Finally, in response to calls to reform the Three-Benchmark presentation to make it less costly and more predictable, the Board held hearings in 2003 and 2004. Based upon testimony from all stakeholders in those hearings, the Board issued a Notice of Proposed Rulemaking in July 2006. Simplified Standards for Rail Rate Cases, Ex Parte No. 646 (Sub-No. 1) (served July 28, 2006).

That rulemaking proceeding culminated in newly-adopted final rules in Simplified Standards, the subject of this Petition for Review. In addition to reforming the existing Three-Benchmark approach, the Board adopted an additional simplified approach called "Simplified Stand-Alone Cost" ("Simplified-SAC"), that the Board described as a simpler and more expedited version of Full-SAC. Simplified Standards at 72 (JA __). The Board also eliminated its uncertain and costly standard for determining whether a shipper is eligible to submit a simplified presentation and replaced it with a "limit to relief" approach that permits any shipper to make either a Three-Benchmark or Simplified-SAC presentation in lieu of a Full-SAC presentation, so long as the shipper accepts limits on relief of $1 million and $5 million, respectively, over a 5 year period. The Board explained that these limits are intended to encourage a Full-SAC presentation for large cases with values that justify the much higher cost. Id. at 27-29 (JA __-__). If a shipper exhausts its maximum rate cap in less than five years

[2] In two instances, occuring in 2005 and 2006, shippers filed complaints, which the parties settled in mediation prior to the submission of evidence. See Simplified Standards at 4, n. 2 (JA __).

(which includes refunds *pendente lite* between any origin-destination pair), the railroad may increase its rates to the challenged levels for the balance of the five-year term. Id. at 28 (JA __).

Petitioners seek review of two aspects of Simplified Standards. First, the *levels* of the relief caps adopted by the Board for Three-Benchmark and Simplified-SAC presentations make those presentations inadequate alternatives to Full-SAC for many cases when a Full-SAC presentation is too costly given the value of the case. Second, Petitioners challenge the Board's rationale and justification for Simplified-SAC. Although the Board asserts that Simplified-SAC is based upon the same CMP principles that underlie Full-SAC, Simplified-SAC arbitrarily deviates from key aspects of CMP, in violation of the Board's own precedent.

SUMMARY OF ARGUMENT

This is a petition for review of the Board's latest effort to develop a simplified and expedited test of reasonable rail rates in those cases where the Board's preferred test, Full-SAC, is too costly given the value of the case. In Simplified Standards, the Board adopted two alternatives to a Full-SAC presentation, known as "Three-Benchmark" and "Simplified-SAC" presentations. The Board considers Full-SAC to be its most precise and preferred method for challenging rail rates, followed by Simplified-SAC and Three-Benchmark presentations. The greater the precision, however, the more complex, costly and time-consuming the case. Petitioners challenge two aspects of Simplified Standards as arbitrary and capricious.

First, Petitioners contend that the Board-imposed relief caps upon Three-Benchmark and Simplified-SAC cases are too low to satisfy the statutory requirements that rail rates to captive shippers "must be reasonable," and that the Board must "establish a simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a

[Full-SAC or Simplified-SAC] presentation is too costly, given the value of the case." 49 U.S.C. §§ 10701(d)(1) and (3).

In order to fulfill the mandate of Section 10701(d)(3), the Board should have identified *minimum* risk factors for Simplified-SAC and Full-SAC presentations. A minimum risk factor is the *lowest* acceptable risk factor that will produce a case value with the "ample cushion" that the Board determined is essential to a cost-effective rate challenge. For example, the minimum risk factor for a Full-SAC presentation multiplied by the estimated litigation cost of Full-SAC represents the *threshold case value* below which a Full-SAC presentation would be too costly, given the value of the case (*i.e.* the point below which the "cushion" between the cost to bring a Full-SAC case and the potential relief would make the case worthwhile). Section 10701(d)(3) requires that complainants with case values *below* this threshold be able to obtain a reasonable rate based on a simplified and expedited alternative. The Board, however, only evaluated risk factors at the *maximum* level of relief permitted by the caps. Because such risk factors only indicate whether there is an "ample cushion" at the very highest level of relief, they say nothing about whether a complainant would have meaningful access to a simplified and expedited method for any case value *below* the cap.

The Board violated Section 10701(d)(1) by refusing to consider how much relief a complainant must forfeit at case values *above* the relief caps before the complainant can pursue its case under the next more complicated and costly methodology, *at a reasonable minimum risk factor*. At some point, the forfeited relief becomes so great that the maximum rail rate permitted by a simplified method can no longer be described as "reasonable" under the statute. If that point is reached before the next more complicated and costly method can be pursued at a reasonable minimum risk factor, then the complainant has neither a reasonable rate nor access to

a simplified method that will produce a reasonable rate given the value of its case. Because the Board never identified reasonable *minimum* risk factors for either a Simplified-SAC or a Full-SAC presentation, it could not determine whether the level of the relief caps presented this problem.

Second, Petitioners contend that the Board's Simplified-SAC alternative to Full-SAC is an arbitrary departure from its own precedent. The Board attempted to simplify a Full-SAC presentation, while remaining true to the economic principles of CMP upon which Full-SAC is based, by eliminating all considerations of efficiency in a Simplified-SAC presentation. A decade earlier, however, the Board rejected any attempt to simplify Full-SAC in this manner because a basic purpose of CMP is to determine the cost of an optimally efficient system. The Board has not cogently explained this stark reversal. Although the Board's *sole* justification for Simplified-SAC is that it is predicated upon CMP, the Board in fact has gutted CMP by eliminating efficiency inquiries from a Simplified-SAC presentation. Thus, there is no reasoned justification to support adoption of Simplified-SAC on the record below.

STANDING

Petitioners are mostly associations whose members use rail transportation to move their products in interstate commerce. They all participated jointly in the proceedings below through one of two coalitions of joint commenters. See Simplified Standards at 11-12 (JA __-__). An association has standing to sue on behalf of its members if: (1) at least one member would have standing to sue in its own right; (2) the interests the association seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit. Sierra Club v. EPA, 292 F.3d 895, 898

(D.C. Cir. 2002). The trade association Petitioners have submitted, in an addendum to this Brief, affidavits addressing these factors.

At least three of the Petitioner associations, The National Industrial Transportation League ("NITL"), Alliance for Rail Competition, and Consumers United for Rail Equity, are dedicated solely to addressing the transportation issues of their members. The other association Petitioners, such as the National Grain and Feed Association ("NGFA"), The Fertilizer Institute ("TFI"), and the American Chemistry Council ("ACC"), represent their members' interests on transportation issues, along with other matters of interest to their respective industries (*e.g.* grain, chemicals). Thus, the interests they seek to protect in this proceeding are germane to their purpose.

In addition, several members of these associations also appeared individually before the Board in the proceedings below, in which they described their interests.[3] Those members are potential plaintiffs in a simplified and expedited rate case using the standards adopted by the Board in Simplified Standards. Thus, they would have standing to pursue this appeal in their own right. The relief requested in this Petition for Review, however, does not require the participation of these individual members in this proceeding.

ARGUMENT

I. THE LEVELS OF THE RELIEF CAPS IMPOSED ON THREE-BENCHMARK AND SIMPLIFIED-SAC PRESENTATIONS VIOLATE THE STATUTE.

The levels of the relief caps adopted by the Board in Simplified Standards violate two integral statutory mandates pertaining to rail rates: (1) that rates for transportation over which a

---

[3] See, Comments of Dow Chemical, filed Oct. 24, 2006, pp. 1-2, 4 (ACC member) (JA __-__, __); Reb. Comments of Dow Chemical, filed Jan. 11, 2007, p. 1 (JA __); Comments of Cargill, Incorporated, filed Oct. 24, 2006, pp. 1-2, 4 (NGFA and NITL member) (JA __-__, __); Comments of CF Industries, Inc., filed Oct. 24, 2006, p. 1 (TFI member) (JA __).

rail carrier possesses market dominance "must be reasonable"; and (2) that the Board "establish a simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case." 49 U.S.C. §§ 10701(d)(1) and (3).

A Full-SAC presentation is the Board's preferred method for challenging the reasonableness of rail rates, because the Board considers it to be the most precise. Simplified Standards at 72 (JA __). However, in Section 10701(d)(3), Congress recognized that Full-SAC is too costly, complex and time-consuming to benefit the large majority of captive shippers given the relatively low value of their cases. Therefore, Congress directed the Board to adopt a simplified and expedited methodology for those cases.

In Simplified Standards, instead of adopting a *single* simplified and expedited method for determining the reasonableness of challenged rail rates, the Board adopted *two* alternative methods. A Three-Benchmark presentation is the simplest and least costly, but also the least precise, method. A Simplified-SAC presentation is much more complex and costly than a Three-Benchmark presentation, but is still less complex and costly than a Full-SAC presentation. Simplified Standards at 5, 27-28 (JA __, __-__). Thus, in attempting to fulfill the Congressional mandate in Section 10701(d)(3), the Board in effect adopted the Simplified-SAC presentation for those cases in which a Full-SAC presentation is too costly, given the value of the case; and it adopted the Three-Benchmark presentation for those cases in which a Simplified-SAC presentation is too costly, given the value of the case.

The Board imposed relief caps upon these two simplified methods as a way to discourage shippers from using either method when the case value merits consideration under the next more costly and complicated method. Id. at 28 (JA __). If the case value exceeds the cap, a shipper

must either forfeit all relief above the cap or present its case under the next more complicated and costly methodology. For example, because the relief cap for a Three-Benchmark presentation is $1 million, a shipper with a case value of $2 million must choose between forfeiting half of this value or making a Simplified-SAC presentation, which is more complicated and costly. The relief caps thus require a shipper to value its own case and to determine whether the trade-off between a lower litigation cost and the applicable relief cap justifies a simplified presentation over the next more complicated and costly presentation. Reconsideration Decision at 6 (JA __).

The Petitioners believe that this "relief cap" approach is a reasonable way to address the requirements of Section 10701(d)(3) *only* if the choice afforded the shipper by the level of the relief caps complies with the statutory standards. This means two things. First, as the Board itself determined, in order to permit meaningful access to a simplified and expedited standard required by Section 10701(d)(3), the relief caps must provide the shipper complainant with an "ample cushion" between the cost to bring the case and the relief available so as to make it worthwhile to bring the complaint. Simplified Standards at 32 (JA __). Second, in those instances where the next more complicated method is too costly given the value of the case (*i.e.* when an "ample cushion" is lacking), the simpler method must be capable of providing a reasonable rate, in compliance with Section 10701(d)(1). The Board, however, set the relief caps for *both* simplified methods at levels too low to satisfy *either* the Congressional requirement for a simplified standard where Full-SAC is "too costly, given the value of the case," *or* the statutory mandate that rates to captive shippers "must be reasonable." Therefore, the relief caps should be overturned because they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706.

A. The Board's Failure to Identify a *Minimum* Risk Factor Was Arbitrary and Capricious.

The statute requires the Board "to establish a simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a [Full-SAC] presentation is too costly, given the value of the case." 49 U.S.C. § 10701(d)(3). In order to determine whether its relief caps comport with this statutory mandate, the Board applied what it called a "risk factor." The risk factor is a multiple, to be applied against a reasonable estimate of the cost of the case. The purpose of the risk factor is to ensure that the relief caps provide "an *ample cushion* between the cost to bring the case and the potential relief available." Simplified Standards at 32 (JA __) (emphasis added). This "cushion" is required because, as the Board acknowledged, "a simplified presentation would not be cost-effective unless the potential relief exceeds the expected cost of obtaining the remedy by a sufficient margin to make it worthwhile to pursue the complaint." Id.; cf. Burlington Northern R.R. Co. v. ICC, 985 F. 2d 589, 599 (D.C. Cir. 1993) (recognizing that "risk allocating devices" may be appropriate due to the higher cost of CMP). The risk factor is multiplied by the estimated litigation cost to identify the case value that will provide the "ample cushion" or "sufficient margin" to make a complaint worthwhile. The Board's risk factor analysis, and thus the relief caps based upon that analysis, is arbitrary and capricious, however, because the Board failed to identify reasonable *minimum* risk factors for Full-SAC and Simplified-SAC presentations. Moreover, the Board also used the wrong cost-value relationship produced by the risk factors to set the relief caps.

A *minimum* risk factor is the *lowest* acceptable risk factor that will produce a case value that still will provide the "ample cushion" that the Board has determined is essential to a cost-effective rate challenge. For example, the *minimum* risk factor for a Full-SAC presentation multiplied by the estimated litigation cost of Full-SAC represents the *threshold case value* below

which a Full-SAC presentation would be too costly, given the value of the case (*i.e.* the point below which the "cushion" between the cost to bring the Full-SAC case and the potential relief would be too small to provide the shipper with a "sufficient margin to make it worthwhile to pursue the complaint."). Simplified Standards at 32 (JA __). Likewise, the *minimum* risk factor for a Simplified-SAC presentation multiplied by the estimated litigation cost of Simplified-SAC represents the *threshold case value* below which a Simplified-SAC presentation would be too costly, given the value of the case. In accordance with Section 10701(d)(3), shippers with a case value *below* these thresholds must be able to obtain a reasonable rate based upon the next more simplified and expedited alternative. Thus, shippers with a case value below the Full-SAC threshold must be able to obtain a reasonable rate based upon Simplified-SAC, and shippers with a case value below the Simplified-SAC threshold must be able to obtain a reasonable rate based upon Three-Benchmark.

The Board erred because it evaluated the reasonableness of its relief caps based *only* upon the risk factor at the *maximum* level of relief permitted by the caps. Because that risk factor only indicates whether there is an "ample cushion" at the very *highest* level of relief, it says nothing about whether a shipper would have meaningful access to a "simplified and expedited method" for the vast range of case values *below* the relief cap.

Furthermore, the Board violated the statute by using the wrong cost-value relationship to set the levels of the relief caps. Section 10701(d)(3) requires the Board to establish a simplified and expedited alternative when the next more complicated and costly rate presentation option is too costly, given the value of the case. Thus, the relief cap for a Simplified-SAC presentation should be based upon the cost-value relationship of a Full-SAC case, and the relief cap for a Three-Benchmark presentation should be based upon the cost-value relationship of a Simplified-

SAC case. But, the Board wrongly focused on the cost-value relationship of a Three-Benchmark case to set the Three-Benchmark relief cap, and a Simplified-SAC case to set the Simplified-SAC relief cap.

It is not, of course, a job for this Court to identify what would be a reasonable minimum risk factor, and thus a reasonable relief cap; that is a job for the Board. The Board, however, did not identify *any* risk factor for a Full-SAC presentation and only identified a *maximum* risk factor for Simplified-SAC presentations. Because the identification of minimum risk factors is an important aspect of setting relief caps at levels that satisfy the mandate of Section 10701(d)(3), the Board's failure to do so was arbitrary and capricious. Motor Vehicle Mfrs. Assoc. of the United States v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983) ("an agency rule would be arbitrary and capricious if the agency...failed to consider an important aspect of the problem") ("State Farm").

1. The Board's failure to identify any risk factor for a Full-SAC presentation precludes a finding that the Simplified-SAC relief cap complies with Section 10701(d)(3).

The Board's first error was failing to identify any risk factor at all for Full-SAC presentations. This prevented the Board from establishing an appropriately reasoned and supported relief cap, in compliance with 49 U.S.C. § 10701(d)(3), for Simplified-SAC presentations. See Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285 (1974) (a court must consider whether the agency's decision is based on a consideration of the relevant factors) ("Bowman").

Section 10701(d)(3) requires the Board "to establish a simplified and expedited method for determining the reasonableness of challenged rail rates *in those cases in which a [Full-SAC] presentation is too costly, given the value of the case.*" (emphasis added) The Board estimated the cost of a Full-SAC presentation to be $5 million. Simplified Standards at 30-32 (JA __-__).

Thus, the threshold case value *below which* a *Full-SAC presentation* becomes "too costly" would equal $5 million multiplied by a reasonable *minimum* risk factor. Below that level, a rational complainant would not present a Full-SAC case because the benefit would not justify the risk. Assuming for example a minimum risk factor of 2.0, the threshold case value needed to justify the cost of a Full-SAC case would be $10 million. That case value, in turn, would constitute a reasonable relief cap for a Simplified-SAC presentation by ensuring that shippers with *lower* case values have a reasonable opportunity to obtain relief, by making a Simplified-SAC presentation, up to the point that their case value justifies the cost of a Full-SAC presentation. But because the Board did not identify *any risk factor at all* for a Full-SAC presentation, there is no record upon which to determine when a Full-SAC presentation is too costly given the value of the case, and thus no record to determine the appropriate relief cap for a Simplified-SAC case. Hence, the Board has failed to address the statute.

The consequences of the Board's failure can be illustrated by a simple example. If a shipper has a case value of $9 million, one option for the shipper would be to bring a Full-SAC case (which is estimated by the Board to have a litigation cost of $5 million). The shipper's risk factor for that Full-SAC case therefore is 1.8 ($9 million divided by $5 million). Is this 1.8 risk factor sufficient to provide an "ample cushion," as the Board's decision requires? No one knows, because the Board never determined what would be an appropriate *minimum* risk factor for a Full-SAC case.[4]

---

[4] Instead of bringing a Full-SAC case (because the shippers determines that a 1.8 risk factor is not sufficient to compensate for the risk), the shipper could bring a Simplified-SAC case, costing $1 million. But a relief cap of $5 million requires the shipper to forfeit $4 million (the $9 million case value minus the $5 million relief cap) *and* permits the railroad to retain the excess $4 million above the relief cap. Does that result in a "reasonable rate" under 49 U.S.C. § 10701? No one knows, since, as discussed in Part I.B., infra, the Board did not address that question either.

The Board asserts that its $5 million relief cap for a Simplified-SAC presentation is reasonable because it provides relief up to five times the estimated litigation cost of $1 million for a Simplified-SAC presentation. Id. at 32 (JA __). But this risk factor of 5.0 only reflects the risk factor that results when a Simplified-SAC case involves the *maximum* potential relief of $5 million.

Moreover, the Board's reasoning does not comport with the statute, which requires the Board to establish a simplified and expedited method when a *Full-SAC presentation* is too costly given the value of the case. 49 U.S.C. § 10701(d)(3). *The statute's focus is upon the cost-value relationship of a Full-SAC case*, not a Simplified-SAC case. The Board's erroneous reliance upon the cost-value relationship of a Simplified-SAC case to justify its Simplified-SAC relief cap is evidence of its failure to address factors relevant to the statute, since the Board did *not* determine when the value of a Full-SAC case fails to justify its cost.

2. The Board's failure to identify a minimum risk factor for a Simplified-SAC presentation precludes a finding that the Three-Benchmark relief cap complies with Section 10701(d)(3).

The Board's second error is similar to its first, because it failed to identify a reasonable *minimum* risk factor for a Simplified-SAC presentation. This prevented the Board from establishing an appropriately reasoned and supported relief cap, in compliance with 49 U.S.C. § 10701(d)(3), for Three-Benchmark presentations. Bowman, supra.

Although the Board did identify a risk factor of 5.0 for a Simplified-SAC presentation, that was the *maximum* risk factor. Specifically, the Board calculated this risk factor by dividing the $5 million maximum relief cap by the $1 million estimated litigation cost. Simplified Standards at 32 (JA __). Because that risk factor is based upon the maximum relief permitted, it is a mathematical certainty that the risk factor will be lower for all case values *below* the cap. But the Board never considered *how much lower* the risk factor can fall and still provide an

"ample cushion between the cost to bring" the Simplified-SAC case and "the potential relief available." Id. Only by identifying a reasonable *minimum* risk factor for a Simplified-SAC case could the Board make that determination. Because the Board did not do so, there is no record to support a conclusion that there is a sufficient risk factor for a Simplified-SAC presentation at any case value *below* the maximum relief permitted by the cap to provide the "ample cushion" that the Board has acknowledged is necessary to determine, under Section 10701(d)(3), whether Simplified-SAC is "too costly, given the value of the case." The absence of a rational connection between the maximum risk factor and the Board's chosen relief cap is arbitrary and capricious. See Burlington Truck Lines, Inc. v. U.S., 371 U.S. 156, 168 (1962).

The Board's two-tiered approach to establish a simplified method to challenge rail rates means that Section 10701(d)(3) requires that the Three-Benchmark presentation be capable of providing a reasonable rate "in those cases in which a [Simplified-SAC] presentation is too costly, given the value of the case." The Board estimated the cost of a Simplified-SAC presentation to be $1 million. Simplified Standards at 30-32 (JA __-__). Thus, the threshold case value *below which a Simplified-SAC presentation* becomes "too costly" would equal $1 million multiplied by a reasonable minimum risk factor. Below that level, a rational complainant would not bring a Simplified-SAC case because the benefit would not justify the risk. Assuming for example a minimum risk factor of 3.0, the threshold case value needed to justify the cost of a Simplified-SAC case would be $3 million. That case value, in turn, would constitute a reasonable relief cap for a Three-Benchmark presentation by ensuring that shippers with *lower* case values have the opportunity to obtain full relief, by making a Three-Benchmark presentation, up to the point that their case value justifies the cost of a Simplified-SAC presentation. But because the Board did not identify a *minimum* risk factor for a Simplified-SAC

presentation, there is no record upon which to determine when a Simplified-SAC presentation is too costly given the value of the case, and thus no record to determine the appropriate relief cap for a Simplified-SAC case. Hence, the Board has failed to address the requirements of the statute.

Again, the consequences of the Board's failure are illustrated by a simple example. If a shipper has a case value of $1.75 million, one option for the shipper would be to bring a Simplified-SAC case (which is estimated by the Board to have a litigation cost of $1 million). The shipper's risk factor for a Simplified-SAC case is therefore 1.75 ($1.75 million divided by $1 million). Is this 1.75 risk factor sufficient to provide an "ample cushion," as the Board's decision requires? No one knows, because the Board never determined what would be an appropriate *minimum* risk factor for a Simplified-SAC case.[5]

The Board nevertheless asserts that its $1 million relief cap for a Three-Benchmark presentation is reasonable because it provides relief up to four times the estimated litigation cost of $250,000 for a Three-Benchmark presentation. Id. at 32 (JA __). But, this risk factor of 4.0 only reflects the *maximum* potential relief. Indeed, the Board failed to analyze the risk factor that results from *any* case value other than the maximum case value. The Board merely picked the *maximum* case value, and declared that, since the maximum case value resulted in an asserted reasonable risk factor, no further analysis was necessary. The Board's failure to analyze whether

[5] Instead of making a Simplified-SAC presentation (because the shipper determines that a 1.75 risk factor is not sufficient to compensate for the risk), the shipper could make a Three-Benchmark presentation, at a cost of $250,000. But a relief cap of $1 million requires the shipper to forfeit $750,000 (the $1.75 million case value minus the $1 million relief cap) and permits the railroad to retain this money. Does that result in a "reasonable rate" under 49 U.S.C. § 10701? No one knows, since, as discussed in Part I.B., infra, the Board did not address that question either.

the risk factors at any case value *below* the maximum case value provide the "ample cushion" that the Board's own decision declares is necessary was arbitrary and capricious.

Moreover, the Board's reasoning does not comport with the statute, 49 U.S.C. § 10701(d)(3). While the Board has set the Three-Benchmark relief cap based upon the cost-value relationship of a Three-Benchmark case, the statute requires the Board to focus on the cost-value relationship of the next more complicated presentation, which is Simplified-SAC. In other words, a Three-Benchmark presentation must be available to all shippers when a Simplified-SAC presentation is too costly, given the value of the Simplified-SAC case. The Board's erroneous reliance upon the cost-value relationship of a Three-Benchmark case to justify its Three-Benchmark relief cap is evidence of its failure to address factors relevant to the statute, since the Board did not analyze when the value of a Simplified-SAC case fails to justify its cost.

B. The Board's Failure to Consider the Reasonableness of the Relief Forfeited by the Caps was Arbitrary and Capricious and Not in Accordance with the Statute.

The Board also arbitrarily refused to consider the reasonableness of the amount of relief a shipper must *forfeit* at case values *above* the relief caps in order to obtain a reasonable minimum risk factor for the next more complicated and more costly case. This failure to consider a factor that is essential, under 49 U.S.C. § 10701(d)(3), to ensuring that shippers with case values too costly for a Full-SAC presentation have a meaningful alternative method to obtain a reasonable rate, under 49 U.S.C. § 10701(d)(1), is arbitrary and capricious. See State Farm, supra.

At some point, the forfeited relief becomes so great that the maximum rail rate permitted by a simplified method can no longer be described as "reasonable" within the meaning of 49 U.S.C. § 10701(d)(1). This is not a concern when the shipper can avoid the cap by presenting its rate challenge under the next more complicated method, *at a reasonable minimum risk factor.* This is erroneous, however, when the next more complicated method *still* remains too costly

given the value of the case, within the meaning of 49 U.S.C. § 10701(d)(3), because the risk factor is too low. In this range of case values, the shipper has *neither* a reasonable rate *nor* access to a simplified method that will produce a reasonable rate given the value of its case. Because the Board never identified reasonable *minimum* risk factors for either a Simplified-SAC or a Full-SAC presentation, it could not determine whether the level of the relief caps presented this problem.

The record presented to the Board illustrates this concern in detail. In their Petition for Reconsideration of Simplified Standards ("Recon. Pet." at 2-12 and Appendix (JA __-__, __-__)), the Petitioners analyzed the consequences of the relief caps adopted by the Board for both a Three-Benchmark and a Simplified-SAC presentation upon a shipper's decision to pursue either of these simplified methods over the next more complicated and costly method. That analysis accepted, *arguendo,* the Board's determination that the litigation costs for a Three-Benchmark, Simplified-SAC, and Full-SAC case are $250,000, $1 million, and $5 million, respectively. The analysis also accepted the Board's risk factors of 4.0 and 5.0 for Three-Benchmark and Simplified-SAC cases, respectively. On the basis of these Board findings, Petitioners' analysis identified a wide range of case values where a shipper would *not* have a meaningful choice between a reasonable rate under the Three-Benchmark method and a reasonable risk factor under the Simplified-SAC method.

For example, beginning at a case value of $1.8 million, the relief forfeited by the $1 million cap (*e.g.* $800,000) for a Three-Benchmark presentation is *greater* than the maximum net relief actually obtainable of $750,000 ($1 million cap minus $250,000 litigation cost). Recon. Pet., Table 1A, Line 13 (JA __). The amount of relief forfeited rises by the same amount as the case value rises. Id. Although the relief cap would increase to $5 million if the shipper were to

make a Simplified-SAC presentation, at a case value of $1.8 million, the risk factor for a Simplified-SAC case plummets to 1.8 and does not even reach a value of 3.0 until the case value equals $3 million. Id., Table 1B, Lines 9-21 (JA __). Both of these risk factors are well below 5.0, which is the *only* risk factor mentioned by the Board at all for Simplified-SAC presentations in its decisions below. Simplified Standards at 32 (JA __).

Furthermore, because the Board never identified an appropriate *minimum* risk factor, there is no record upon which to conclude whether a risk factor of 1.8, 3.0, or any other factor less than 5.0 provides the "cushion" that is necessary to ensure that "the potential relief exceeds the expected cost of obtaining the remedy by a sufficient margin to make it worthwhile to pursue the complaint." Id. That knowledge, however, is essential for the Board to determine whether the shipper in this example has a meaningful choice between a Three-Benchmark and a Simplified-SAC presentation. The Board must be able to determine whether the shipper can avoid forfeiting *over half* of its relief under a Three-Benchmark presentation by instead presenting a Simplified-SAC case at a reasonable minimum risk factor. The Board's failure even to identify a minimum risk factor, however, precludes this determination.

If a Simplified-SAC presentation in fact is too costly given the value of the case because a risk factor below 3.0 is too low, then shippers with case values ranging from $1.8 to $3 million face a Hobson's choice between a Three-Benchmark presentation that forfeits between one-half and two-thirds of their case value, or a Simplified-SAC presentation with risk factors far below 5.0, which is the only factor the Board has identified as relevant and presumably reasonable. Compare Recon. Pet., Table 1A, Lines 13-25 (JA __) with Table 1B, Lines 9-21 (JA __).[6] But

[6] For example, at a case value of $3 million, a shipper making a Three-Benchmark presentation will forfeit two-thirds of its relief ($3 million case value less the $1 million relief cap), before even accounting for the $250,000 litigation cost. The shipper obtains $750,000 in net relief, and

the Board never analyzed whether the first choice, by allowing the defendant railroad to retain up to two-thirds of the relief forfeited by the cap, provides even the semblance of a reasonable rate as required by 49 U.S.C. § 10701(d)(1).[7] And as discussed above, the Board never analyzed whether the second choice is too costly given the value of the case under 49 U.S.C. § 10701(d)(3).

The Board's Simplified-SAC relief cap produces a similar Hobson's choice within a significant range of case values *above* the cap. Recon. Pet. at 9 (JA __). The Board has capped Simplified-SAC relief at $5 million, which is precisely equal to the Board's estimated cost of a Full-SAC presentation. Thus, for example, a shipper with a case value of $7.5 million must choose whether to recover net relief of $4 million ($5 million cap minus $1 million litigation cost) with a Simplified-SAC presentation, or $2.5 million ($7.5 million less $5 million litigation cost) with a Full-SAC presentation. Compare Recon. Pet., Table 2A, Line 9 (JA __) with Table 2B, Line 6 (JA __). The choice does not produce equal net relief of $4 million until the case value reaches $9 million. Compare Id., Table 2A, Line 12 (JA __) with Table 2B, Line 9 (JA __). Although a shipper does not gain more from a Full-SAC presentation until its case value exceeds $9 million, it must forfeit up to half its net relief under a Simplified-SAC presentation before reaching that point. Again, the Board failed to analyze whether the Simplified-SAC option, by allowing the defendant railroad to retain up to half of the relief forfeited by the cap, provides even the semblance of a reasonable rate as required by 49 U.S.C. § 10701(d)(1), and

---

forfeits (*i.e.* must pay the carrier) $2 million above the rate level determined "reasonable" by the Three-Benchmark presentation.

[7] If the value of the rate relief exceeds the relief cap within a five year period, the railroad is permitted to increase its rate to the challenged rate level that was determined to be unreasonable for the balance of the five year period. Simplified Standards at 28 (JA __).

again failed to analyze whether the Full-SAC option remains too costly given the value of the case under 49 U.S.C. § 10701(d)(3).

The Board, however, cavalierly dismissed this detailed analysis presented by the Petitioners below:

> The fact that some shippers may face a difficult choice of which method to use would be true at any level at which the limits might be set. Any shipper that believes its case falls near the upper end of the relief available under a particular method would face this choice. Ultimately, we do not think it is improper for there to be some trade-off involved in using a simpler, faster, and less costly method that is inherently less precise. We believe the limits we have set strike the appropriate balance so that we do not open the door to excessive litigation under methods that are not justified for the amount at dispute.

Reconsideration Decision at 8 (JA __). Such a cursory analysis is the antithesis of reasoned decision-making. Because the Board did not identify reasonable minimum risk factors, it could not determine whether there is an "appropriate balance" between the rate relief forfeited by the caps and the existence of a reasonable minimum risk factor for the next more complicated and more costly method that would permit greater relief. Thus, the Board's statement that the relief caps it adopted "strike the appropriate balance" is unsupported by any analysis whatsoever. This is arbitrary and capricious.

Furthermore, although a difficult choice may be appropriate in order to encourage shippers to use a more complicated and costly method, it is not appropriate *when the more costly method remains too costly given the value of the case*. The difficult choice still must afford the opportunity to obtain a reasonable rate at a reasonable minimum risk factor. For example, if the relief caps for each simplified and expedited method are based upon the appropriate minimum risk factor for the next more complicated and more costly method multiplied by the appropriate litigation cost estimate for that same method, the difficult choice also would be a reasonable

choice. This is because the minimum risk factor for the next more complicated and costly method would be preserved at all case values *above* the relief cap, ensuring that this choice of methodology is not too costly given the value of the case. In addition, for all cases with values *below* the relief cap, a simplified and expedited alternative to the more complicated method is capable of providing a reasonable rate. Only then can the Board fulfill the mandate of Section 10701(d)(3).

II. SIMPLIFIED-SAC IS AN ARBITRARY AND CAPRICIOUS DEPARTURE FROM BOARD PRECEDENT.

The Board's reasoning for adopting Simplified-SAC is predicated on an arbitrary and capricious determination that Simplified-SAC is grounded in the principles of CMP. That determination is an unreasonable deviation from the Board's precedent. An agency that departs from its own precedent must "cogently explain why it has exercised its discretion in a given manner." State Farm, 463 U.S. at 48. Although the Board acknowledges its deviation in this case, its explanation is not rational.

Through Simplified-SAC, the Board attempted "to develop a procedure that simplifies, expedites, and reduces the cost for a shipper to bring a rate challenge, while approximating the results of Full-SAC as closely as possible." Simplified Standards at 72 (JA __). The Board concluded that, "[b]ecause Simplified-SAC is more similar to the (more precise) Full-SAC analysis, the results of Simplified-SAC should be fairer, more precise, and better supported in economic principles than those produced under the Three-Benchmark approach." Id. The sacrifices that the Board made in order to simplify and expedite Full-SAC, however, gut the very CMP principles that give a Full-SAC analysis it precision. This renders the rationale for adopting Simplified-SAC arbitrary and capricious.

A. The Board's Refusal to Consider Efficiency in a Simplified-SAC Presentation is an Unreasonable Departure From Its Prior Determinations that Efficiency is an Essential Objective of CMP.

The two economic theories behind CMP are differential pricing and contestability of markets. Guidelines, 1 I.C.C. 2d at 525. Full-SAC introduces the competitive standard of contestability into non-competitive rail markets by approximating "the full economic costs, including a normal profit, that need to be met for an *efficient* producer to provide service to the shipper(s) identified. This cost calculation produces a simulated competitive price standard against which actual rates can be compared." Id. at 529 (emphasis added). See also, id. at 542 ("The purpose of a SAC analysis is to determine the *least* cost at which an *efficient* competitor could provide the service...."). Although efficiency thus is essential to the economic theory of contestability underlying CMP, the Board has removed that factor from a Simplified-SAC presentation, while continuing to claim that Simplified-SAC is based upon CMP principles.

Although the Board has long held that "CMP provides the only economically precise measure of rate reasonableness and therefore must be used whenever possible...," it concluded early on that "other procedures can, and indeed must, be made available for those cases in which CMP simply cannot be used—because the traffic is so infrequent or widely dispersed that it is not susceptible to a SAC presentation or because the case is so small in value that the substantial expense of a CMP presentation...cannot be justified." Non-Coal Guidelines, 1 S.T.B. at 1021 (1996). Thus, in 1996, the Board's first attempt to adopt a simplified and expedited method, in response to 49 U.S.C. § 10701(d)(3), rejected a Simplified-SAC proposal in favor of a Three-Benchmark methodology. Id. at 1014-18.

A major reason for rejecting the Simplified-SAC methodology in 1996, as proposed by the Association of American Railroads ("AAR"), was its failure to consider efficiencies:

> First, whereas the purpose of CMP-SAC is to estimate the cost of a hypothetical and *optimally efficient* stand-alone transportation system designed to *maximize efficiencies* and production economies, the AAR-SSAC model is restricted to segments of the existing rail system. Moreover, all lines in the rail network are valued at full replacement cost, even though not all existing railroad assets should, or ever would, be replaced. Because it is doubtful that an *optimally efficient* carrier entering the market would use the same technology and same assets as the existing carrier, AAR-SSAC is not based on a *fully efficient* system. *Thus, the program fails one of the basic purposes of CMP-SAC, which is to determine the cost of an optimally efficient system.*

Id. at 1015 (emphasis added).

The Simplified-SAC presentation adopted in Simplified Standards suffers from this same fundamental flaw. The Board observed that Full-SAC has two objectives, which it refers to as the elimination of cross-subsidies and the elimination of inefficiencies. See Simplified Standards at 13 ("Under the SAC test, rate relief is available only where a captive shipper demonstrates that it is cross-subsidizing other parts of the defendant's rail network or is bearing the costs of a carrier's inefficiencies.") (JA __). Because the Board concluded that "the second objective [] turns Full-SAC presentations into an intricate, expensive undertaking," it determined that " the inquiry under the Simplified-SAC method...will be limited to whether the captive shipper is being forced to cross-subsidize other parts of the railroad's network." Id. at 13-14 (JA __-__). In other words, the Board has chosen to ignore the efficiency objective of the contestable market theory underlying CMP.

Ironically, this simplifying assumption made by the Board for a Simplified-SAC presentation is the same assumption that it rejected in 1996 because the assumption failed a basic purpose of CMP to determine the cost of an optimally efficient system. Specifically, the Board now finds it reasonable to restrict the Simplified-SAC analysis to segments of the existing rail system valued at full replacement cost. Id. at 14 ("We will assume that that all existing

infrastructure along the predominant route used to haul the complaint traffic is needed to serve the traffic moving over that route;" "the Simplified-SAC method...includes a reasonable return on the replacement cost of those investments.") (JA __).[8]

The Board has not provided a reasoned explanation for this sudden about-face. The Board rationalizes that this change of direction is appropriate due to changes in rail capacity and traffic conditions since 1996. Id. Because current railroad capacity is constrained, whereas the industry was burdened with excess capacity in 1996, the Board presumes that railroads must now be operating much more efficiently. Id. at 56 (JA __). Assuming, *arguendo*, that railroads are capacity-constrained due to significant increases in demand for rail transportation services since 1996, it does not follow that railroads are operating efficiently. The Board's logic incorrectly transposes the causality function between railroad efficiency and capacity, without a shred of evidence as to the nature, extent or direction of that causality. In fact, the Board concluded, when it previously examined this question, that the direction of the causality was exactly the opposite: in other words, capacity is a function of efficiency; not the other way around.[9]

Specifically, the Board cited this distinction between capacity and efficiency when it rejected a Simplified-SAC proposal in 1996. As an example of this distinction, the Board noted that, although railroads historically solved congestion problems by double-tracking significant

---

[8] The Board's sole concession to the efficiency objective is that, if the complainant submits "compelling evidence" that some carrier facilities have fallen into disuse, those facilities will be excluded from the Simplified-SAC analysis. Id. at 56 (JA __).

[9] Capacity also is a function of sunk costs. Much of the existing U.S. rail capacity is based on investment decisions made long ago that are sunk in nature. An optimally efficient railroad that enters the market today, which is a basic premise of Full-SAC, would not be bound by sunk investments. More likely, it would construct a different, more efficient, facility based on current market conditions. This further undermines the Board's claim that "railroads, in most instances, are likely operating at a sufficiently efficient level so that it would not be worth the time and considerable expense required to attempt to measure the amount of inefficiency that could be eliminated by a SARR." Id.

parts of their systems (*i.e.* building parallel tracks on the same route), computerized traffic control now permits greater amounts of traffic to be handled without double tracking. Non-Coal Guidelines at 1015, n. 33. A Full-SAC presentation would not replicate a railroad's existing costly double track infrastructure, if the same amount of traffic could be handled more efficiently by a single track using computerized traffic control. The presence of capacity constraints on the double track rail line, in this example, reflects an inefficient operation, the cost of which, under CMP, should not be imposed on captive shippers. For that reason, in 1996 the Board rejected *any* simplifying assumption that would restrict a Simplified-SAC complainant to the same technology and assets as the existing railroad. Under Simplified Standards, however, the Board would consider the capacity constraints in this same example to be indicative of an *efficient* operation. The Board's irrational and inconsistent logic, in Simplified Standards, constitutes an arbitrary departure from its own precedent.

The Board claims that it was necessary to eliminate these efficiency inquiries because, otherwise, a Simplified-SAC presentation would quickly spiral back to the complexity of a Full-SAC analysis. Id. at 57 (JA __). Regardless whether that statement is true, it cannot justify adopting Simplified-SAC in a stark reversal of long-established precedent. *The Board's sole justification for Simplified-SAC is that it is predicated upon CMP.* But, by eliminating the inquiry into inefficiencies, the Board has gutted the theory of contestability that underlies a Full-SAC presentation. Contestability is one of two integral economic theories underlying CMP. Thus, despite the Board's claims that Simplified-SAC is based upon CMP, elimination of the efficiency objective in fact has turned Simplified-SAC into an exercise that is far from CMP and without any other economic justification.

When the Board encountered the same obstacle to Simplified-SAC in 1996, it concluded that "other procedures can, and indeed must, be made available for those cases in which CMP simply cannot be used...." Non-Coal Guidelines at 1021. Consistent with that precedent, the Board must either offer a Simplified-SAC option that includes efficiency considerations, or it must rely upon other procedures (*e.g.* Three-Benchmark) for all rate challenges where a Full-SAC presentation is too costly, given the value of the case. 49 U.S.C. § 10701(d)(3).

B. The Board's Refusal to Test Simplified-SAC Was Arbitrary and Capricious.

Before the Board rejected the Simplified-SAC proposal in 1996, its predecessor, the ICC, ran tests to determine whether that proposal would approximate the results of a CMP-based Full-SAC presentation. The results of those tests convinced the Board that the theoretical flaws in that Simplified-SAC proposal, including the failure to consider efficiencies discussed in the preceding section, produced unsupportable results. Non-Coal Guidelines at 1012, 1016-17. In several Full-SAC decisions, the Board has found rail rates unreasonable to the extent that they exceed 180% of variable costs, which is the statutory floor for rail rate relief.[10] See Burlington Northern R.R. v. STB, 114 F.3d 206, 210 (D.C. Cir. 1997). When the Board tested the AAR's version of Simplified-SAC in 1996, it found rates as high as 5000% of variable cost to be reasonable. Non-Coal Guidelines at 1016. Despite the presence of some of those same flaws in the current Simplified-SAC methodology, the Board refused to test Simplified-SAC to determine whether the results at least would roughly approximate a Full-SAC presentation. Simplified Standards at 54-55 (JA __-__).

The Board's assertions that the statute does not require testing and that the Board did not test the Full-SAC or Three-Benchmark methods miss the point. The testing requirement arises

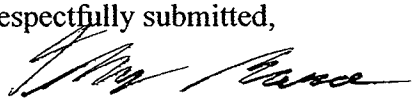
[10] E.g., Kansas City P&L Co. v. Union Pac. R.R. Co., STB Docket No. 42095 (served May 19, 2008); West Texas Utilities Co. v. Burlington Northern R.R. Co., 1 S.T.B. 638 (1996).

from the Board's decision to adopt Simplified-SAC based upon the assertion that it is grounded in CMP principles, despite completely exorcising efficiency considerations from the process. Moreover, because the Board's own tests of a prior Simplified-SAC proposal that suffered this same deficiency exposed anomalous results, the Board was on notice that this potential problem had a high probability of recurrence in the current Simplified-SAC methodology. Therefore, the Board's failure to test its Simplified-SAC proposal was arbitrary and capricious.

CONCLUSION

For the reasons set forth above, Petitioners request that this Court reverse Simplified Standards, in part, on grounds that (1) the relief caps adopted by the Board for Three-Benchmark and Simplified-SAC presentations are arbitrary, capricious, and not in accordance with law; and (2) the Simplified-SAC presentation adopted by the Board is arbitrary, capricious, and not in accordance with law.

Respectfully submitted,



Andrew P. Goldstein
John M. Cutler, Jr.
McCarthy, Sweeney & Harkaway, P.C.
2175 K Street, NW, Suite 600
Washington, DC 20037
Phone: (202) 775-5560

Nicholas J. DiMichael
Jeffrey O. Moreno
THOMPSON HINE LLP
1920 N Street, NW, Suite 800
Washington, DC 20036
Phone: (202) 331-8800

Attorneys for Petitioners, The National Industrial Transportation League, et al.

Dated: October 21, 2008

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as modified by the August 22, 2008 Order of this Court, because this brief contains 9739 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(2). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32(a)(1) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 (11.8227.8202) SP3 in 12-point, Times New Roman.

Jeffrey O. Moreno

Dated: October 21, 2008

Attorney for Petitioners,
The National Industrial
Transportation League et al.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October, 2008, two copies of the foregoing BRIEF OF PETITIONERS THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE ET AL. were served by hand delivery, in accordance with the Federal Rules of Appellate Procedure upon:

Robert B. Nicholson
John P. Fonte
U.S. Dept. of Justice
Appellate Section – Antitrust Division
950 Pennsylvania Ave., N.W.
Room 3224
Washington, DC 20530

Attorneys for Respondent

Samuel Moore Sipe, Jr.
Anthony J. LaRocca
Steptoe & Johnson, LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795

Attorneys for
Association of American Railroads

Terence M. Hynes
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005-0000

Attorney for
Canadian Pacific Railway Company
Delaware and Hudson Railroad Company, Inc.
Soo Line Railroad Company

Ellen D. Hanson
Raymond A. Atkins
Anika S. Cooper
Surface Transportation Board
395 E Street, S.W.
Suite 1260
Washington, DC 20423

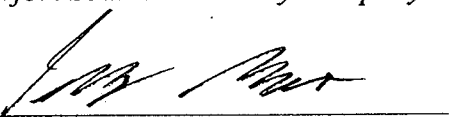
Attorneys for Respondent

Michael L. Rosenthal
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401

Attorney for
Union Pacific Railroad Company

G. Paul Moates
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005-0000

Attorney for
Norfolk Southern Railway Company



Jeffrey O. Moreno
Thompson Hine LLP
1920 N Street, N.W., Suite 800
Washington, DC 20036
Phone: (202) 331-8800
Fax: (202) 331-8330

Attorney for Petitioners, The National Industrial Transportation League et al.

PETITIONERS' STANDING AFFIDAVITS

AFFIDAVIT OF BRUCE CARLTON

I, Bruce Carlton, hereby declare:

1. I am President of The National Industrial Transportation League (the "League").

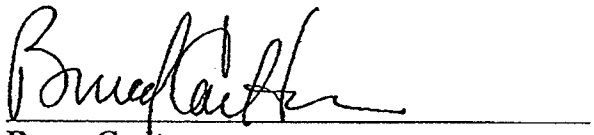
2. The League is one of the oldest and largest national associations representing companies engaged in the transportation of goods in both domestic and international commerce. Founded in 1907, the League currently has over 600 company members, including some of the largest users of the nation's transportation system, as well as smaller companies. For over 100 years, the League has worked for a competitive, efficient, and safe transportation system in the U.S. by participating in regulatory, legislative, and judicial proceedings concerning national and international transportation issues.

3. The League participated on behalf of its members in the rulemaking proceeding before the Surface Transportation Board resulting in a final decision in STB Ex Parte No. 646 (Sub-No. 1), Simplified Standards for Rail Rate Cases (served Sept. 5, 2007), reconsideration denied, (served March 19, 2008) ("Simplified Standards"). Those members would have the right to challenge the reasonableness of their rail transportation rates under the standards and procedures adopted by the Board in Simplified Standards.

4. Several League members also participated in Simplified Standards as individual companies. One of those members was E.I. du Pont de Nemours and Company, which subsequently filed the first rate challenges at the Board under the rules adopted in Simplified Standards.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 14, 2008



Bruce Carlton

AFFIDAVIT OF

KENDELL W. KEITH

I, Kendell W. Keith, hereby declare:

1. I am President of National Grain and Feed Association ("NGFA").

2. NGFA is a trade organization whose membership consists largely of grain elevators, grain processors, feed manufacturers and animal/poultry feeders who ship or receive agricultural commodities by rail. Among the purposes of NGFA is to improve conditions under which markets for agricultural commodities function, including responsiveness of rail service to agricultural needs. To help further that goal, NGFA has a standing Rail Shipper-Receiver Committee which meets regularly to discuss rail issues, including regulatory actions affecting rail rate levels.

3. NGFA participated on behalf of its members in the rulemaking proceeding before the Surface Transportation Board resulting in a final decision in STB Ex Parte No. 646 (Sub-No. 1), *Simplified Standards for Rail Rate Cases* (served September 5, 2007), *reconsideration denied* (served March 19, 2008) ("*Simplified Standards*"). NGFA members would have the right to challenge the reasonableness of their rail transportation rates under the standards and procedures adopted by the Board in *Simplified Standards*.

4. Cargill Incorporated is a NGFA member which also participated in *Simplified Standards* as an individual company,

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 14, 2008.

Kendell W. Keith

AFFIDAVIT OF FORD WEST

I, Ford West, hereby declare:

1. I am President of The Fertilizer Institute ("TFI").

2. TFI is the national trade association that represents fertilizer producers, importers, retailers, wholesalers and others involved in the business of fertilizer. The mission of TFI is to represent, promote and protect the fertilizer industry. TFI members are major users of rail transportation and they take a strong interest in rail transportation issues. TFI has a Transportation Council that develops policy positions on all transportation issues, including rail.

3. TFI participated on behalf of its members in the rulemaking proceeding before the Surface Transportation Board resulting in a final decision in STB Ex Parte No. 646 (Sub-No. 1), Simplified Standards for Rail Rate Cases (served Sept. 5, 2007), reconsideration denied, (served March 19, 2008) ("Simplified Standards"). TFI's members would have the right to challenge the reasonableness of their rail transportation rates under the standards and procedures adopted by the Board in Simplified Standards.

4. Two TFI members, CF Industries, Inc. and Terra Industries, also participated in Simplified Standards as individual companies.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 14, 2008

Ford West

AFFIDAVIT OF CONSUMERS UNITED FOR RAIL EQUITY (CURE)

I, Robert G. Szabo, hereby declare:

1. I am Executive Director and Counsel of Consumers United for Rail Equity ("CURE").

2. CURE is a non-profit, incorporated membership group whose purpose is to advocate improved federal policy regarding rail customers, particularly those that are dependent on rail for transportation.

3. CURE participated on behalf of its members in the rulemaking proceeding before the Surface Transportation Board resulting in a final decision in STB Ex Parte No. 646 (Sub-No. 1), Simplified Standards for Rail Rate Cases (served Sept. 5, 2007), reconsideration denied, (served March 19, 2008) ("Simplified Standards"). CURE members would have the right to challenge the reasonableness of their rail transportation rates under the standards and procedures adopted by the Board in Simplified Standards.

4. Olin Chemicals is a CURE member that also participated in Simplified Standards as an individual company.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 20, 2008

Robert G. Szabo
Executive Director and Counsel
Consumers United for Rail Equity
1050 Thomas Jefferson Street, N.W.
Seventh Floor
Washington, D.C. 20007
202-298-1920 (office)
rgs@vnf.com

AFFIDAVIT OF THOMAS E. SCHICK

I, Thomas E. Schick, hereby declare:

1. I am Senior Director of Distribution at the American Chemistry Council ("ACC").

2. ACC's 130 members account for approximately 85 percent of U.S. capacity for the production of basic industrial chemicals and manufacture a wide array of products that are offered for shipment by railroads and other carriers. The business of chemistry depends upon the railroads for the safe, efficient and secure transportation of chemical products. In 2007, chemical shipments amounted to 176 million tons and accounted for $6.8 billion in rail freight revenues. Chemicals constitute the second-largest specific commodity carried by rail (coal ranks first). ACC's Distribution Committee, which meets on a regular basis, addresses issues relating to rail transportation.

3. ACC participated on behalf of its members in the rulemaking proceeding before the Surface Transportation Board resulting in a final decision in STB Ex Parte No. 646 (Sub-No. 1), Simplified Standards for Rail Rate Cases (served September 5, 2007), reconsideration denied (served March 19, 2008) ("Simplified Standards"). ACC members would have the right to challenge the reasonableness of their rail transportation rates under the standards and procedures adopted by the Board in Simplified Standards.

4. Several ACC members also participated in Simplified Standards as individual companies. One of those members was E.I. du Pont de Nemours and Company, which subsequently filed the first rate challenges at the Board under the rules adopted in Simplified Standards. Other members who participated include The Dow Chemical Company, Occidental Chemical Corporation, and Olin Chemicals.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 20, 2008

Thomas E. Schick

AFFIDAVIT OF Terry C. Whiteside

I, Terry C. Whiteside, hereby declare:

1. I am Chairman of the Alliance for Rail Competition ("ARC").

2. ARC is an organization composed of rail shippers whose mission is to support the Nation's railroads and their workforce to achieve a reliable and safe railroad network that serves all consumers ensuing American competitiveness.

3. ARC participated on behalf of its members in the rulemaking proceeding before the Surface Transportation Board resulting in a final decision in STB Ex Parte No. 646 (Sub-No. 1), Simplified Standards for Rail Rate Cases (served Sept. 5, 2007), reconsideration denied, (served March 19, 2008) ("Simplified Standards"). ARC members would have the right to challenge the reasonableness of their rail transportation rates under the standards and procedures adopted by the Board in Simplified Standards.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 14, 2008

Terry C Whiteside

Terry C. Whiteside

AFFIDAVIT OF Idaho Wheat Commission

I, **Idaho Wheat Commission**, hereby declare:

1. I am Blaine Jacobson of **Idaho Wheat Commission** ("IWC").

2. ("IWC") is an organization dedicated to developing markets for wheat and barley:. One facet of that market development is rail transportation.

3. ("IWC") participated on behalf of its producers in the rulemaking proceeding before the Surface Transportation Board resulting in a final decision in STB Ex Parte No. 646 (Sub-No. 1), Simplified Standards for Rail Rate Cases (served Sept. 5, 2007), reconsideration denied, (served March 19, 2008) ("Simplified Standards"). ("IWC") producers would have the right to challenge the reasonableness of their rail transportation rates under the standards and procedures adopted by the Board in Simplified Standards.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 20, 2008

Blaine Jacobson

AFFIDAVIT OF National Association of Wheat Growers

I, **National Association of Wheat Growers**, hereby declare:

1. I am Daren Coppock, Chief Executive Officer of the **National Association of Wheat Growers ("NAWG").**

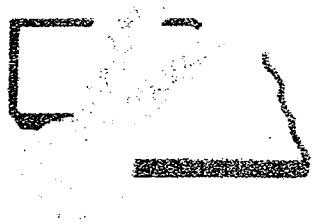
2. **("NAWG")** is an organization dedicated to delivering a favorable policy environment for wheat producers. One of its authorized purposes is developing markets for wheat, and one facet of that market development is rail transportation.

3. **("NAWG")** participated on behalf of its producers in the rulemaking proceeding before the Surface Transportation Board resulting in a final decision in STB Ex Parte No. 646 (Sub-No. 1), Simplified Standards for Rail Rate Cases (served Sept. 5, 2007), reconsideration denied, (served March 19, 2008) ("Simplified Standards"). We believe that **("NAWG")** producers would have the right to challenge the reasonableness of their rail transportation rates under the standards and procedures adopted by the Board in Simplified Standards.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 20, 2008.

W. Daren Coppock, Chief Executive Officer



THE NEBRASKA
WHEAT GROWERS ASSOCIATION

P.O. Box 66063
Lincoln, Nebraska 68506

Telephone (402) 471-2388
FAX (402) 471-3445

AFFIDAVIT OF Nebraska Wheat Growers Association

I, **Nebraska Wheat Growers Association**, hereby declare:

1. I am Zoe Olson, Public Information Officer of the **Nebraska Wheat Growers Association** (**NWGA**).

2. **NWGA** is an organization representing farm producers in all facets of the marketing of grain, one facet of which includes rail transportation.

3. **NWGA** participated on behalf of its members in the rulemaking proceeding before the Surface Transportation Board resulting in a final decision in STB Ex Parte No. 646 (Sub-No. 1), Simplified Standards for Rail Rate Cases (served Sept. 5, 2007), reconsideration denied, (served March 19, 2008) ("Simplified Standards"). **NWGA** members would have the right to challenge the reasonableness of their rail transportation rates under the standards and procedures adopted by the Board in Simplified Standards.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 16, 2008.

Zoe Olson, Public Information Officer

AFFIDAVIT OF Colorado Wheat Administrative Committee

I, **Colorado Wheat Administrative Committee**, hereby declare:

1. I am **Terry Whiteside, representing and on behalf of Colorado Wheat Administrative Committee ("COWAC").**

2. **("COWAC")** is an organization dedicated to developing markets for wheat. One facet of that market development is rail transportation.

3. **("COWAC")** participated on behalf of its producers in the rulemaking proceeding before the Surface Transportation Board resulting in a final decision in STB Ex Parte No. 646 (Sub-No. 1), Simplified Standards for Rail Rate Cases (served Sept. 5, 2007), reconsideration denied, (served March 19, 2008) ("Simplified Standards"). **("COWAC")** producers would have the right to challenge the reasonableness of their rail transportation rates under the standards and procedures adopted by the Board in Simplified Standards.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 20, 2008

Terry C Whiteside

_____

AFFIDAVIT OF Colorado Association ofWheat Growers Association

I, Colorado Association of Wheat Growers, hereby declare:

1. I am **Terry Whiteside, representing and on behalf of Colorado Association of Wheat Growers ("COAWG").**

2. **COAWG** is an organization representing farm producers in all facets of the marketing of grain, one facet of which includes rail transportation.

3. **COAWG** participated on behalf of its members in the rulemaking proceeding before the Surface Transportation Board resulting in a final decision in STB Ex Parte No. 646 (Sub-No. 1), Simplified Standards for Rail Rate Cases (served Sept. 5, 2007), reconsideration denied, (served March 19, 2008) ("Simplified Standards"). **COAWG** members would have the right to challenge the reasonableness of their rail transportation rates under the standards and procedures adopted by the Board in Simplified Standards.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 20, 2008

Terry C Whiteside

_____

IDAHO BARLEY COMMISSION

AFFIDAVIT OF Idaho Barley Commission

I, **Idaho Barley Commission**, hereby declare:

1. I am **Terry Whiteside, representing and on behalf of The Idaho Barley Commission ("IBC").**

2. **("IBC")** is an organization dedicated to developing markets for barley. One facet of that market development is rail transportation.

3. **("IBC")** participated on behalf of its producers in the rulemaking proceeding before the Surface Transportation Board resulting in a final decision in STB Ex Parte No. 646 (Sub-No. 1), Simplified Standards for Rail Rate Cases (served Sept. 5, 2007), reconsideration denied, (served March 19, 2008) ("Simplified Standards"). **("IBC")** producers would have the right to challenge the reasonableness of their rail transportation rates under the standards and procedures adopted by the Board in Simplified Standards.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 20, 2008

Terry C Whiteside

_____

AFFIDAVIT OF Oklahoma Wheat Commission

I, **Oklahoma Wheat Commission**, hereby declare:

1. I am **Terry Whiteside, representing and on behalf of Oklahoma Wheat Commission ("OKWC").**

2. **("OKWC")** is an organization dedicated to developing markets for wheat. One facet of that market development is rail transportation.

3. **("OKWC")** participated on behalf of its producers in the rulemaking proceeding before the Surface Transportation Board resulting in a final decision in STB Ex Parte No. 646 (Sub-No. 1), Simplified Standards for Rail Rate Cases (served Sept. 5, 2007), reconsideration denied, (served March 19, 2008) ("Simplified Standards"). **("OKWC")** producers would have the right to challenge the reasonableness of their rail transportation rates under the standards and procedures adopted by the Board in Simplified Standards.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 20, 2008

Terry C. Whiteside

_____

AFFIDAVIT OF South Dakota Wheat Commission

I, **South Dakota Wheat Commission**, hereby declare:

1. I am Randy L. Englund, Executive Director of the **South Dakota Wheat Commission ("SDWC")**.

2. **("SDWC")** is an organization dedicated to developing markets for SD wheat. One facet of that market development is rail transportation.

3. **("SDWC")** participated on behalf of its producers in the rulemaking proceeding before the Surface Transportation Board resulting in a final decision in STB Ex Parte No. 646 (Sub-No. 1), Simplified Standards for Rail Rate Cases (served Sept. 5, 2007), reconsideration denied, (served March 19, 2008) ("Simplified Standards"). **("SDWC")** producers would have the right to challenge the reasonableness of their rail transportation rates under the standards and procedures adopted by the Board in Simplified Standards.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 16, 2008

Randy L. Englund

Randy L. Englund

AFFIDAVIT OF South Dakota Wheat Inc.

I, South Dakota Wheat Inc., hereby declare:

1. I am **Terry Whiteside, representing and on behalf of South Dakota Wheat Inc.** ("**SDWI**").

2. **SDWI** is an organization representing farm producers in all facets of the marketing of grain, one facet of which includes rail transportation.

3. **SDWI** participated on behalf of its members in the rulemaking proceeding before the Surface Transportation Board resulting in a final decision in STB Ex Parte No. 646 (Sub-No. 1), Simplified Standards for Rail Rate Cases (served Sept. 5, 2007), reconsideration denied, (served March 19, 2008) ("Simplified Standards"). **SDWI** members would have the right to challenge the reasonableness of their rail transportation rates under the standards and procedures adopted by the Board in Simplified Standards.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 20, 2008

Terry C Whiteside

_____

AFFIDAVIT OF Texas Wheat Producers Association

I, **Texas Wheat Producers Association**, hereby declare:

1. I am Rodney Mosier, Executive Vice President of **Texas Wheat Producers Association** ("**TXWPA**").

2. **TXWPA** is an organization representing farm producers in all facets of the marketing of wheat, one facet of which includes rail transportation.

3. **TXWPA** participated on behalf of its members in the rulemaking proceeding before the Surface Transportation Board resulting in a final decision in STB Ex Parte No. 646 (Sub-No. 1), Simplified Standards for Rail Rate Cases (served Sept. 5, 2007), reconsideration denied, (served March 19, 2008) ("Simplified Standards"). **TXWPA** members would have the right to challenge the reasonableness of their rail transportation rates under the standards and procedures adopted by the Board in Simplified Standards.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 16, 2008.

Rodney Mosier

AFFIDAVIT OF Texas Wheat Producers Board

I, Texas Wheat Producers Board, hereby declare:

1. I am Rodney Mosier, Executive Vice President of **Texas Wheat Producers Board ("TXWPB")**.

2. **TXWPB** is an organization dedicated to developing markets for wheat. One facet of that market development is rail transportation.

3. **TXWPB** participated on behalf of its producers in the rulemaking proceeding before the Surface Transportation Board resulting in a final decision in STB Ex Parte No. 646 (Sub-No. 1), Simplified Standards for Rail Rate Cases (served Sept. 5, 2007), reconsideration denied, (served March 19, 2008) ("Simplified Standards"). **TXWPB** producers would have the right to challenge the reasonableness of their rail transportation rates under the standards and procedures adopted by the Board in Simplified Standards.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 16, 2008.

Rodney Mosier

NEBRASKA WHEAT

AFFIDAVIT OF Nebraska Wheat Board

I, **Nebraska Wheat Board**, hereby declare:

1. I am Royce Schaneman, Executive Director of the **Nebraska Wheat Board (NWB)**.

2. **NWB** is an organization dedicated to developing markets for wheat. One facet of that market development is rail transportation.

3. **NWB** participated on behalf of its producers in the rulemaking proceeding before the Surface Transportation Board resulting in a final decision in STB Ex Parte No. 646 (Sub-No. 1), Simplified Standards for Rail Rate Cases (served Sept. 5, 2007), reconsideration denied, (served March 19, 2008) ("Simplified Standards"). **NWB** producers would have the right to challenge the reasonableness of their rail transportation rates under the standards and procedures adopted by the Board in Simplified Standards.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 16, 2008.

Royce Schaneman, Executive Director

301 Centennial Mall South – 4th Floor • P.O. Box 94912 • Lincoln, NE 68509
Phone 402 471 2358 • Fax 402.471.3446 • E-mail nwb@wheat.ne.gov
www.nebraskawheat.com

AFFIDAVIT OF Idaho Grain Producers Association

I, **Idaho Grain Producers Association**, hereby declare:

1. I am **Terry Whiteside, representing and on behalf of Idaho Grain Producers Association** ("**IGPA**").

2. **IGPA** is an organization representing farm producers in facets of the marketing of grain, one facet of which includes rail transportation.

3. **IGPA** participated on behalf of its members in the rulemaking proceeding before the Surface Transportation Board resulting in a final decision in STB Ex Parte No. 646 (Sub-No. 1), Simplified Standards for Rail Rate Cases (served Sept. 5, 2007), reconsideration denied, (served March 19, 2008) ("Simplified Standards"). **IGPA** members would have the right to challenge the reasonableness of their rail transportation rates under the standards and procedures adopted by the Board in Simplified Standards.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 20, 2008

Terry C Whiteside

_____

WASHINGTON WHEAT COMMISSION

907 W. Riverside Avenue • Spokane, Washington 99201-1006
(509) 456-2481 • FAX (509) 456-2812

AFFIDAVIT OF WASHINGTON WHEAT COMMISSION

I, **WASHINGTON WHEAT COMMISSION**, hereby declare:

1. I am Glen Squires, Vice President of **Washington Wheat Commission ("WWC").**

2. **("WWC")** is an organization dedicated to developing markets for wheat. One facet of that market development is rail transportation.

3. **("WWC")** participated on behalf of its producers in the rulemaking proceeding before the Surface Transportation Board resulting in a final decision in STB Ex Parte No. 646 (Sub-No. 1), Simplified Standards for Rail Rate Cases (served Sept. 5, 2007), reconsideration denied, (served March 19, 2008) ("Simplified Standards"). **("WWC")** producers would have the right to challenge the reasonableness of their rail transportation rates under the standards and procedures adopted by the Board in Simplified Standards.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 20, 2008

Glen Squires

AFFIDAVIT OF National Barley Growers Association

I, **National Barley Growers Association**, hereby declare:

1. I am **Terry Whiteside, representing and on behalf of National Barley Growers Association** ("**NBGA**").

2. **NBGA** is an organization representing farm producers in facets of the marketing of grain, one facet of which includes rail transportation.

3. **NBGA** participated on behalf of its members in the rulemaking proceeding before the Surface Transportation Board resulting in a final decision in STB Ex Parte No. 646 (Sub-No. 1), Simplified Standards for Rail Rate Cases (served Sept. 5, 2007), reconsideration denied, (served March 19, 2008) ("Simplified Standards"). **NBGA** members would have the right to challenge the reasonableness of their rail transportation rates under the standards and procedures adopted by the Board in Simplified Standards.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 20, 2008

Terry C Whiteside

AFFIDAVIT OF Montana Wheat & Barley Committee

I, **Montana Wheat & Barley Committee**, hereby declare:

1. I am **Terry Whiteside, representing and on behalf of Montana Wheat & Barley Committee ("MWBC").**

2. **("MWBC")** is an organization dedicated to developing markets for wheat and barley. One facet of that market development is rail transportation.

3. **("MWBC")** participated on behalf of its producers in the rulemaking proceeding before the Surface Transportation Board resulting in a final decision in STB Ex Parte No. 646 (Sub-No. 1), Simplified Standards for Rail Rate Cases (served Sept. 5, 2007), reconsideration denied, (served March 19, 2008) ("Simplified Standards"). **("MWBC")** producers would have the right to challenge the reasonableness of their rail transportation rates under the standards and procedures adopted by the Board in Simplified Standards.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 20, 2008

Terry C Whiteside